CITIZENS COAL COUNCIL, ET AL.

IBLA 94-366 Decided December 15, 1997

Appeal from Decisions of the Acting Director, Office of Surface Mining Reclamation and Enforcement, finding that a railroad and a pipeline, used to transport coal from surface mines, are not regulated by the Federal surface coal mining act. 94-16-Johnson/Bird.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally

The OSM properly concluded that a railroad and a pipeline, used solely to transport coal from surface mines to remote electrical generating stations, are not "surface coal mining operations," within the meaning of section 701(28)(B) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(B) (1994), and are therefore not subject to the requirements of that Act.

APPEARANCES: Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for Appellants; James R. Bird, Esq., and Benjamin J. Vernia, Esq., Washington, DC, for the Peabody Western Coal Company; Jack D. Palma, II, P.C., Esq., Cheyenne, Wyoming, and Donald B. Atkins, Esq., Tulsa, Oklahoma, for Black Mesa Pipeline, Inc.; John B. Weldon, Jr., Esq., and Stephen E. Crofton, Esq., Phoenix, Arizona, for the Salt River Project Agricultural Improvement and Power District; Jon K. Johnson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Citizens Coal Council, the Water Information Network, and the Dineh-Hopi Alliance (collectively, Appellants) have appealed from two identical Decisions of the Acting Director, Office of Surface Mining Reclamation and Enforcement (OSM), dated February 25, 1994. Responding to Appellants' citizens complaints, OSM found that two transportation facilities associated with the Black Mesa/Kayenta Mines are not "surface coal mining operations" governed by the Surface Mining Control and Reclamation

Act of 1977 (SMCRA), as amended, 30 U.S.C. §§ 1201-1328 (1994), and are therefore not subject to the permitting and other requirements of SMCRA.

The two mines are owned and operated by the Peabody Western Coal Company (PWCC), and are located in northeastern Arizona within the Navajo/Hopi Indian Reservations. The transportation facilities are a railroad, known as the Black Mesa and Lake Powell (BM&LP) Railroad, which is owned (along with others) and operated by the Salt River Project Agricultural Improvement and Power District (SRP), and a coal slurry pipeline, which is owned and operated by Black Mesa Pipeline, Inc. (BMP). The PWCC, BMP, and SRP have all filed answers to Appellants' Statement of Reasons for Appeal (SOR) and all are joined as proper parties to this appeal.

The pipeline at issue is 273 miles long and is buried for most of its length. It carries coal from the Black Mesa Mine to the Mohave Generating Station, in Laughlin, Nevada. Coal extracted at the mine is crushed by PWCC and placed on a conveyor system, which is owned by PWCC, BMP, and the Mohave Generating Station, and operated by PWCC. That system carries the coal to a preparation plant, which is owned and operated by BMP, where it is further crushed and water is added to create a coal slurry. The conveyor system and preparation plant are all within the area proposed by PWCC for permitting under SMCRA as part of the Black Mesa Mine. The proposed mine permit would cover the conveyor system. The BMP has applied for a separate permit for the plant. Following preparation, the coal slurry leaves the plant by way of BMP's pipeline, traversing a portion of the proposed mine permit area and continuing on to the electrical generating station in Laughlin, Nevada, where it is used for fuel.

The railroad at issue is 83 miles long, and carries coal from the Kayenta Mine to the Navajo Generating Station, in Page, Arizona. Coal extracted at the mine is crushed by PWCC and placed on a conveyor system, which is owned and operated by PWCC. That system carries the coal to silos and a loadout facility, which are also owned by PWCC. The conveyor system, silos, and loadout facility are all within the permit area for the Kayenta Mine and covered by the mine permit. At the loadout facility, the coal is loaded into cars and transported by SRP's railroad to the electrical generating station in Page, Arizona, where it is used for fuel.

Title to the coal passes from PWCC to the electrical generating station either at the station (Black Mesa Mine) or at the loadout facility (Kayenta Mine). Further, the railroad and the pipeline are operated for the sole purpose of transporting all of the coal produced by PWCC at each mine to the respective electrical generating station. Throughout the 17-year operation of the mines from the enactment of SMCRA in 1977 to the 1994 Decisions at issue here, neither transportation facility has ever been permitted or otherwise authorized to operate under that Act.

In her Decisions, the Acting Director concluded that the railroad and pipeline are not "surface coal mining operations" regulated by SMCRA. She

concluded that the applicable statutory standard is whether they can be considered facilities "resulting from or incident to" PWCC's surface coal mining activities at the Black Mesa/Kayenta Mines, under section 701(28)(B) of SMCRA, 30 U.S.C. § 1291(28)(B) (1994), as that standard is explicated in the preamble to 1988 final rulemaking, 53 Fed. Reg. 47377 (Nov. 22, 1988). (Decision at 1-2, 3.) Applying this standard, the Acting Director held that neither the railroad nor the pipeline can be considered to result from or be incident to PWCC's mining activities since a substantial portion of each facility is located well beyond the minesite, the primary function of the facility is to supply coal to a power plant, and, because the facility is not owned or operated by PWCC, it is more economically dependent on the generating station than on the mine. (Decision at 3; see id. at 4, 5.) The Acting Director also noted that weighing against SMCRA regulation is the fact that neither the statute nor the regulations explicitly cover either facility and that regulating them at this point would "reverse longstanding decisions by [OSM] which have been relied upon" by the operator of the facility. Id. at 3, 5.

In their SOR, Appellants contend that the railroad and pipeline should be considered "surface coal mining operations," within the meaning of section 701(28)(B) of SMCRA, 30 U.S.C. § 1291(28)(B) (1994), because they are "facilities 'resulting from or incident to' surface coal mines that [PWCC] operates on Navajo lands." (SOR at 2 (quoting from 30 U.S.C. § 1291(28)(B) (1994)).) They argue that this is so because each facility is "functionally integrated with the mine it serves because it provides the sole means of transporting coal from the mine site directly to the mine's only customer" and serves no other mine, and each is "economically dependent upon the mine they serve because the mine is their sole source of cargo, and thus presumably their sole source of revenue." (SOR at 29, 30.) Appellants distinguish this situation from that of a common carrier, noting that each transportation facility and its respective mine and power plant are a "closed, unified industrial operation." Id. at 14, 16. They argue that to find that the facilities at issue here do not result from or are not incident to the mines, would exclude all such facilities from SMCRA jurisdiction. Since the railroad and pipeline are section 701(28)(B) facilities, Appellants assert that OSM must require PWCC to either amend its existing or proposed mine permits to encompass them or obtain separate permits for them. Failing such amendment or permit, OSM must preclude any further operation of these facilities.

[1] Section 701(28)(A) of SMCRA provides that "surface mining operations" are "activities conducted on the surface of lands in connection with a surface coal mine," including "excavation * * *, and * * * chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, [and] loading of coal for interstate commerce at or near the mine site." 30 U.S.C. § 1291(28)(A) (1994). Subsection B further provides that such operations include the "areas upon which such activities occur or where such activities disturb the natural land surface." It also states that

> [s]uch areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities[.]

30 U.S.C. § 1291(28)(B) (1994) (emphasis added). In enacting SMCRA, Congress stated that "surface coal mining operations" thus include "all roads, facilities[,] structures, property, and materials on the surface resulting from or incident to [surface coal mining] activities, such as refuse banks, dumps, culm banks, impoundments and processing wastes." S. Rep. No. 128, 95th Cong., 1st Sess. 98 (1977) (emphasis added).

We find nothing in section 701(28)(B) of SMCRA, or its legislative history, which expressly provides that transportation facilities, especially ones that carry processed coal to a remote point of sale/use, should generally be considered "surface coal mining operations," subject to regulation under SMCRA. Rather, the statute indicates that the point at which the coal is loaded for shipment, following all processing/preparation necessary for marketing and associated transportation, constitutes the last stage of mining and related operations subject to SMCRA, either under section 701(28)(A) or (B). See Ann Lorentz Coal Co. v. OSM, 79 IBLA 34, 43, 91 Interior Dec. 108, 113 (1984). Congress made no specific provision for regulating the transportation of processed coal, even though that activity is itself a "major industrial sector," which encompasses railroads, barges, trucks, and pipelines "that collectively stretch over thousands of miles throughout the nation." (PWCC Answer at 2, 9.) The fact that it did not, strongly indicates that Congress did not intend to regulate the transportation of processed coal under SMCRA, presumably leaving it to regulation pursuant to other Federal and state laws.

We turn to SMCRA's implementing regulations. When the Department first promulgated regulations in 1979 designed to permanently govern surface coal mining activities, it established general standards for constructing and maintaining transportation facilities other than roads, which were said to include "[r]ailroad loops, spurs, sidings, surface conveyor systems, chutes, aerial tramways, or other transportation facilities." 30 C.F.R. § 816.180 (1979). The Department explained in the preamble to the final rulemaking that the regulation was intended to cover transportation facilities "incident to coal mining operations," which are required for the "[m]ovement of coal, equipment and personnel within the mine plan area." 44 Fed. Reg. 15260, 15261 (Mar. 13, 1979) (emphasis added).

In 1983, the Department defined what constitutes facilities resulting from or incident to surface coal mining activities, termed "support facilities," requiring that they be operated "in accordance with a permit issued for the mine or coal preparation [plant] to which [they are] incident or from which [their] operation results." 30 C.F.R. §§ 701.5 and 816.181 (1983). It said that such facilities "may" include "railroads, surface conveyor systems, chutes, aerial tramways, or other transportation facilities." Id. However, the Department also stated, at the end of the regulation, that "'[r]esulting from or incident to' a[] [surface coal mining] activity connotes an element of proximity to that activity." Id. Further, in the preamble to the final rulemaking, the Department indicated that whether the enumerated transportation facilities could be considered support facilities hinged on whether they did, in fact, result from or were incident to such activities. See 48 Fed. Reg. 20396 (May 5, 1983) ("[T]o be regulated under Section 701(28)(B) a facility must result from or be incident to an activity regulated under Section 701(28)(A)"); National Wildlife Federation (NWF) v. Hodel, 839 F.2d 694, 746 n.80 (D.C. Cir. 1988).

Moreover, the Department particularly stated that it would interpret the regulation "to include all facilities located up to the point of loadout of coal for interstate transport." 48 Fed. Reg. 20397 (May 5, 1983) (emphasis added). Thus, where coal was transported by rail, the regulation "would extend to the loadout facility located at or near the mine site from which run of mine coal is conveyed or trucked to the rail line and loaded," and this same principle would also apply in the case of other modes of transportation, such as trucks, barges, and pipelines. Id. This regulation would have clearly excluded that portion of the railroad and pipeline at issue here, which are located beyond the loadout point.

In 1988, the Department dropped that regulatory definition, leaving the requirement in 30 C.F.R. § 816.181 that "support facilities" be operated under the permit for the individual mine or coal preparation plant to which they were incident or from which their operation resulted. It rejected any categorical exclusion or inclusion in favor of a case-by-case determination of what facilities can properly be regulated under SMCRA, and declined to define what facilities result from or are incident to mining activities. See 53 Fed. Reg. 47380, 47382 (Nov. 22, 1988).

However, in the preamble which accompanied its 1988 rulemaking, the Department provided that OSM would address three factors when deciding whether a facility is properly considered to result from or be incident to surface coal mining activities: (1) Whether the facility is geographically proximate to the producing mine; (2) whether the facility is functionally tied to the particular mine in question; and (3) whether the facility is economically dependent upon that particular mine. 53 Fed. Reg. 47379, 47381 (Nov. 22, 1988). The Department noted that the factors of geographic proximity and function had been endorsed by the circuit court in NWF, when it reviewed the propriety of the prior "support facilities" definition in 30 C.F.R. § 701.5 (1983). See 839 F.2d at 765-66.

Appellants assert that this case should be decided by applying the above three factors. (SOR at 8.) The other parties to the case likewise utilize those criteria. See Decision at 1, 3; OSM Answer at 9-10; PWCC Answer at 18; SRP Answer at 14; BMP Answer at 10.

We conclude that, even applying the criteria outlined in the 1988 preamble but never formally adopted by the Department, the railroad and pipeline at issue here do not constitute facilities "resulting from or incident to" regulated surface coal mining activities, within the meaning of section 701(28)(B) of SMCRA.

We agree with OSM that both the railroad and pipeline are not geographically proximate to the surface coal mining activities at issue here, since most of those transportation facilities are located many miles from the Black Mesa/Kayenta Mines. Indeed, 80 percent of the pipeline and railroad is located more than 54 and 16 miles, respectively, from the 2 mines. These facilities do not become geographically proximate because they originate at and traverse a small portion of the mine area that is currently permitted or proposed for permitting. (SOR at 11, 18.) To so hold would render all transportation facilities proximate unless the coal is first transported outside the mine area by other means and then placed into the facility. We do not think this is what the Department intended. Nor is geographic proximity affected by the particular use made of the facilities or, generally, the functional and economic concerns that animate the other criteria. Id.

Next, we conclude that, in order to be considered to "result[] from or [be] incident to" surface coal mining activities which are themselves subject to SMCRA regulation under section 701(28)(A) of SMCRA, within the meaning of 30 U.S.C. § 1291(28)(B) (1994), facilities must be functionally and economically tied to regulated surface coal mining activities, and thus be justifiably also subject to such regulation. This does not mean that the facilities must be actually "involved in excavation, processing or loading coal," i.e., section 701(28)(A) activity. (SRP Answer at 16.) Rather, there must be a direct and meaningful connection to such activity. See United States v. Devil's Hole, Inc., 747 F.2d 895, 897-98 (3d Cir. 1984) (mining waste piles used to recover anthracite silt - "incidental facility"); Paul F. Kuhn, 120 IBLA 1, 30-32, 98 Interior Dec. 231, 246-47 (1991) (natural gas pipeline section relocated from mine area - "incidental facility"). We think that is the clear intent of Congress in expanding the definition of "surface coal mining operations" to include "incidental facilities" and also of the Department when it adopted the relevant criteria. See NWF, 839 F.2d at 743, 744; 53 Fed. Reg. 47379 (Nov. 22, 1988); 48 Fed. Reg. 20393 (May 5, 1983). Indeed, to hold otherwise would bring facilities within the ambit of SMCRA regulation that are not somehow functionally and/or economically tied to regulated surface coal mining activity. We find nothing to indicate that Congress and the Department intended to do so.

At the present time, the railroad and pipeline are functionally tied to and economically dependent on the surface coal mining activities at issue here in the limited sense that they currently serve only to transport all of the coal from the Black Mesa/Kayenta Mines to the final point of use and derive all of their revenues from that service. However, there is no evidence that the two facilities are otherwise functionally tied, in any way, to the actual operation of or the conducting of any particular surface coal mining activity regulated by SMCRA.

As the circuit court instructed in NWF, 839 F.2d at 745, the phrase "resulting from or incident to" requires some type of proximate causation, "[o]therwise, every support facility that could be considered a 'but for' result of a surface coal mining operation would be subject to SMCRA regulation." We conclude that the railroad and pipeline are not functionally tied to any regulated surface coal mining activity, other than by the mere fact that they transport the final product derived from such activity to market. That fact alone does not render the facilities subject to SMCRA regulation, since it would encompass any and all transportation facilities. There is simply no evidence that Congress and the Department intended to apply the "incidental facilities" definition of "surface coal mining operations" in such a broad fashion.

Therefore, we conclude that the Acting Director, OSM, properly held that the BM&LP Railroad and BMP's coal slurry pipeline are not "surface coal mining operations," within the meaning of section 701(28)(B) of SMCRA, and are not subject to the permitting and other requirements of the Act.

To the extent Appellants have raised other arguments not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed.

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John H. Kelly
Administrative Judge

I concur:

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R.W. Mullen
Administrative Judge